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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARIE and CRYSTAL L., Persons Coming Under the Juvenile Court Law.	B148438 x-ref. B147744 (Super. Ct. No. CK 33634)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOHNNY L. and MARIE A., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County. Debra L. Losnick, Temporary, Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Stephanie M. Davis, under appointment by the Court of Appeal, for Defendant and Appellant Johnny L.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant Marie A.

Lloyd W. Pellman, County Counsel, Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

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We affirm the order terminating the parental rights of appellants Marie A. and Johnny L. over minors Marie L. and Crystal L. (Welf. & Inst. Code, § 366.26.)[1] Appellants contend the juvenile court should have applied the section 366.26, subdivision (c)(1)(A) exception, which applies when termination would be detrimental to the minors because they have had regular visitation and contact with their parents and would benefit from continuing that contact. Here, however, the court found appellants were culpable in the unexplained, nonaccidental death of their daughter, Stephanie L., a battered child. That finding compels the conclusion, as a matter of law, that continued contact would pose a substantial risk of harm and detriment to the minors, far outweighing any incidental benefit to be gained from maintaining the parental relationship.

BACKGROUND

Mother, who first gave birth at age 13, had seven children, three younger children by Father (Marie L., Stephanie L., and Crystal L.), and four older children by another. The four older children (Misael Q., Johnny Q., Anthony Q., and Matthew Q.) are under legal guardianship and are not parties to this proceeding.

Both Mother and Father have a history of drug addiction.

Marie was born on January 10, 1997. At the time, Mother and Father were living with paternal grandmother Teresa L.

On April 21, 1998, Mother gave birth to Stephanie L., who was born prematurely at 30 to 32 weeks gestation with cocaine in her system. Mother also tested positive for cocaine.

The Los Angeles County Department of Children and Family Services filed a section 300 petition regarding Marie and Stephanie on April 24, 1998. Marie was

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[1] All further statutory references are to the Welfare and Institutions Code.

detained in Grandmother's home,[2] while Stephanie remained hospitalized in the intensive care unit. Upon Stephanie's release from the hospital, she was also detained in Grandmother's home. It appears that Mother and Father continued living in Grandmother's home during the reunification period, although it also appears one or both lived elsewhere from time to time.

The court sustained the petition at the jurisdictional and dispositional hearings on July 15, 1998. Mother and Father were given reunification services. The reunification plan included individual counseling, parenting education, drug counseling and random drug testing.

By the six-month review hearing on January 13, 1999, the parents had not completed the plan due to having been terminated from drug counseling for poor attendance. Although Marie and Stephanie were under the age of three, the Department recommended, and the court granted, an additional six months of reunification services.[3] The court also allowed Mother and Father to continue living with Marie and Stephanie at Grandmother's home.

At the 12-month review hearing in July 1999, the court allowed a 60-day visit in the parents' (Grandmother's) home. During the visit, on August 29, 1999, Stephanie suffered a spiral fracture to the left wrist. The parents told Department social workers that Stephanie had fallen from her crib and the injury was a "hair-line fracture only[.]"

By September 1999, Mother and Father had completed drug counseling and continued to test clean for drugs. The court ordered Marie and Stephanie returned to Mother and Father's custody. The family was given maintenance services. Father and Mother were no longer required to drug test or attend counseling.

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2 In a related appeal, Grandmother appeals from an order denying her motion for de facto parent status. (*In re Marie & Crystal L.* (No. B147744).)

3 Section 361.5, subdivision (a)(2) provides: "For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care."

On October 21, 1999, Stephanie died under suspicious circumstances. According to Mother, Stephanie had developed a habit of throwing herself backwards onto the (carpeted) floor during tantrums. Mother stated that on the evening of October 20, 1999, Stephanie had a tantrum before bedtime. Father stated he had found Stephanie unconscious in her bed at midnight and attempted CPR. After phoning Grandmother, who came to the house,[4] the parents called the police. Stephanie was taken to the hospital, where she was pronounced dead on arrival. Marie was taken into protective custody, and a police investigation ensued.

On October 25, 1999, the Department filed a supplemental petition (§ 342) for Marie, alleging that Stephanie had died of unexplained causes resulting from the unreasonable or negligent acts or omissions of Mother, Father, and/or Grandmother. On October 26, 1999, the court ordered Marie detained and placed in shelter care. Mother and Father were given monitored visits.

On October 28, 1999, Crystal was born. The Department filed a petition for Crystal on November 2, 1999. (§ 300, subds. (b) [minor at substantial risk of physical harm due to parents' inability or failure to adequately supervise or protect], and (j) [minor at substantial risk of abuse or neglect due to the abuse or neglect or of a sibling].) Crystal was ordered detained in foster care on November 3, 1999, and the parents were given monitored visitation.

On January 10, 2000, the Department filed amended section 300 and 342 petitions regarding Crystal and Marie, respectively. In addition to subdivisions (b) and (j) of section 300, the petitions alleged subdivisions (a) [substantial risk of serious future injury inflicted nonaccidentally by the child's parent], (e) [severe physical abuse inflicted upon a child under age five], (f) [parent caused the death of another child through abuse or neglect], and (i) [child subjected to acts of cruelty by a parent or the parent has failed to protect the child from acts of cruelty]. The Department acted partly on the basis of

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[4] Grandmother moved out of the house after custody was returned to the parents.

preliminary findings by Dr. Carol D. Berkowitz, executive vice-chair of the Department of Pediatrics of the Harbor-UCLA Medical Center and professor of Clinical Pediatrics at the UCLA School of Medicine. Dr. Berkowitz stated in her letter dated December 30, 1999, that the parents' explanation of Stephanie's death was not consistent with the evidence. She stated in part: "On or about 10/21/99, Stephanie was found not breathing by her father. It is unclear why her father went to check on her specifically, why she was on the floor and whether this was her usual place to sleep. Although the paternal grandmother suggests that Stephanie was alive when found, the data from law enforcement/paramedics noting severe stiffness suggests that rigor mortis had set in and that she had been dead for a while. At the age of 18 months, she is out of the age range for SIDS. The fall to the carpet could not have caused a lethal head injury."

The autopsy report, dated January 10, 2000, failed to state a cause of death due to the lack of an eyewitness or confession to confirm the physical signs of possible suffocation. [5] The autopsy report indicated Stephanie had suffered physical abuse including multiple bruising, pulled hair, possible suffocation, and "three old injuries: [¶] 1. Possible twisting injury to the bone of the right lower leg, [¶] 2. A broken left forearm with twisting injury to the upper arm, [¶] 3. Focal fibrosis and evidence of old bleeding in the mesentery (under the stomach). [¶] Stephanie's caregivers had previously taken her to the doctor for a 'sprained ankle' and a fall from a crib at the age of 14-16 months. Both of these household accidents rarely cause bony injury and must in retrospect be regarded as suspicious. No history to explain the deep abdominal injury has been offered, and none is likely because this is clearly an inflicted injury (due to punch by an adult) in this age group."

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[5] The autopsy report indicated that Stephanie's lungs showed signs of possible suffocation, "but suffocation cannot be diagnosed at autopsy unless there is a confession or an eyewitness. In addition, to these acute findings, Stephanie's lung showed evidence of previous bleeding – a finding that has been associated with past episodes of attempted suffocation in some reported cases."

Dr. Berkowitz, upon examining the autopsy report, stated that in her opinion, "the preponderance of medical evidence is that Stephanie had prior inflicted trauma."

Following an adjudication hearing in April 2000, the juvenile court sustained the petitions as to section 300, subdivisions (a), (b), (i), and (j). The court specifically found Mother, Father, and Grandmother were not credible witnesses due to inconsistencies in their statements. The court found that the parents had not explained Stephanie's death and prior injuries. The court found that Stephanie was a battered child whose death was not accidental: "[T]he court completely agrees . . . that this certainly looks like a battered-child-syndrome case, and as we all know, it starts with minimal injuries and increases, and . . . results in a child's death, which is what I think we have here." The court refused to sustain the petition as to section 300, subdivision (f) [parent caused the death of another child through abuse or neglect], however, due to the court's uncertainty whether Mother, Father, or Grandmother was the perpetrator: "Going back to [subdivision (f)], it is this court's belief that I need to have exactly what happened to this child. I need to have a named perpetrator[.] [W]hile I think that someone, either the father, the mother, or the grandmother in fact caused the death of this child, I don't know exactly what happened to this child, and I do not feel it would be appropriate for me to find [the subdivision (f) allegation] true which necessitates me finding who caused the death of the child."

The court appointed Dr. Michael Ward as the Evidence Code section 730 evaluator. Dr. Ward, who testified at the August 2000, disposition hearing, stated that the decision to terminate the parents' contact with the minors depends on who was responsible for Stephanie's injuries and death. Dr. Ward testified in part that if the parents had caused Stephanie's injuries and death, "then, of course, their contact should be terminated. . . . If they didn't, then by definition these children are being kept from parents they should not be kept from. . . . But so the issue is, you know, if we knew what happened and who did it, we wouldn't be here. That would be solved so you know for sure, but it would be very detrimental for a child not to be with a parent unless there is a

very, very good reason not to be with a parent, and there is reason here clearly to be very concerned about it, obviously."

At the close of the disposition hearing, the court found that reunification services would not be appropriate under sections 361.5, subdivision (b)(6) [services need not be offered where the parent has inflicted severe physical harm on the minor or the minor's sibling, and the court finds that reunification services would not benefit the minor]. The court declared Crystal to be a dependent minor and removed custody from the parents. Marie and Crystal were ordered suitably placed. Counseling was ordered for both parents and Grandmother. Permanent placement services were ordered and a section 366.26 hearing was set.

By November 2000, Crystal and Marie were placed with the same foster parents, who wish to adopt them.

Both parents attended many, but not all, of their monitored visits with Crystal and Marie.

At the section 366.26 hearing, the court found credible the damaging testimony of Father's uncle, Hector R., who saw Father shove Mother and pull her hair, and overheard Father and Mother blaming each other for Stephanie's death. According to Hector, Mother said that she had kicked Stephanie in the stomach; Father said that he had hit Stephanie on the head with a closed fist. On December 30, 2000, the day after Hector overheard those statements, Father attacked Hector with a hammer to the head while he was asleep, sending him to the hospital. While Father was hitting Hector, Father said that he was going to kill Hector. Mother, who was present during the attack on Hector, yelled, "'Kill him. Kill him.'" Hector believed he was attacked because he had overheard the parents discussing their roles in Stephanie's death. After the attack, Hector spoke with Grandmother (Hector's half-sister), who told him that Mother and Father had "said that they had killed [Hector]."

On January 10, 2001, Hector went to the Department and reported what the parents had said and done. At the section 366.26 hearing, Dr. Ward testified that if

Hector's story was true, "of course, that would change my opinion. It would be extremely negative information, and it would certainly have to make anyone say that this child or any child would be at great risk with these people."

Marie, who was born in January 1997, lived with her parents for almost the first three years of her life until Stephanie's death in October 1999. Crystal, who was born after Stephanie's death, has never lived with her parents. Dr. Ward testified at the section 366.26 hearing that it would "definitely" be better for Marie, who is now almost five years old, to be adopted at age five rather than at age six or seven or older. With regard to adoption, Dr. Ward testified that "if you are going to do it, get on with the process because the earlier the better for developing these relationships."

At the close of the section 366.26 hearing, the trial court stated in part: "I would also note that Dr. Ward indicated that if . . . the court were to find [Hector's testimony] true [it] would cause him great concern, and I do find [Hector's] testimony to be completely credible." The court found the section 366.26, subdivision (c)(1)(A) exception to be inapplicable: "In this case I have a situation where the parents have only had monitored visits. In addition to . . . only having monitored visits, there has been significant violation of the court's order during those visits as testified to by the monitor and the grandmother, who were present during the violations of the visits. [¶] The court does not feel that there has been a benefit shown to me that would reach to the level of the exception having been proven."

The court found by clear and convincing evidence that Marie and Crystal were likely to be adopted and terminated parental rights. These appeals followed.

DISCUSSION

Of the three permanent plans for a dependent child — adoption, legal guardianship, or foster care — adoption is the preferred plan. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 546.) "Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child's best interests are other, less permanent plans,

such as guardianship or long-term foster care considered." (*In re Brian R.* (1991) 2 Cal.App.4th 904, 924.)

Adoption requires the termination of the birth parents' legal rights to the child. "[I]n order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated." (*Cynthia D.* v. *Superior Court* (1993) 5 Cal.4th 242, 249-250.)

Where, as here, the birth parents have failed to reunify and the minors are likely to be adopted, parental rights will be terminated unless the parent proves one of the four exceptional circumstances of section 366.26, subdivision (c)(1). In this case, both parents rely on subdivision (c)(1)(A): "The parents or guardians have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship."

This particular exception applies where "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.

"Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive,

emotional attachment from child to parent." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

In reviewing the trial court's findings, we apply the substantial evidence test. "'If there is any substantial evidence to support the findings of the juvenile court, a reviewing court must uphold the trial court's findings. All reasonable inferences must be in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order. [Citation.]'" (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 168, quoting *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 58.)

In this case, following Stephanie's death, the parents attended many but not all of their monitored visits with Marie and Crystal. Marie, who lived with her parents for almost the first three years of her life, is now almost five years old. Accordingly, Marie knows her parents and has developed a parent-child relationship with them. Crystal, on the other hand, has never lived with her parents, who she knows only through monitored visits.

What sets alarms ringing here is the fact that the court found Hector's testimony to be true, which means that both parents were culpable in battering Stephanie to death, and attacking Hector with a hammer with the intent to kill him. In addition, the court found, through Hector's testimony, that Father has committed physical violence against Mother. On this record, it is impossible, as a matter of law, for Marie and Crystal to be safely placed in their parents' custody for any reason. The record amply supports the trial court's finding that the subdivision (c)(1)(A) exception is inapplicable.

At the earlier adjudication hearing in April 2000, the court was handicapped by its lack of information concerning Stephanie's death. The court identified Stephanie as a battered child and found her death was not accidental, but could not determine whether Mother, Father, or Grandmother was the perpetrator. Accordingly, at that time, the court refused to sustain the petition as to the section 300, subdivision (f) allegation [parent caused the death of another child through abuse or neglect]. When later given Hector's testimony, however, the court found him "completely credible." This necessarily means

that both parents were culpable in Stephanie's abuse leading to death, as well as the attack on Hector. In our view, that finding, which is amply supported by the record, conclusively eliminates the subdivision (c)(1)(A) exception from the case. Parents who beat a child to death and attack someone with a hammer cannot, as a matter of law, be trusted to have custody in any form over minor children. Dr. Ward testified that if Hector's story is true, "of course, that would change my opinion. It would be extremely negative information, and it would certainly have to make anyone say that this child or any child would be at great risk with these people."

At this late stage of the proceedings, the minors' best interests, not the parents', are paramount. Preserving the nuclear family is not the "overriding concern if a dependent child cannot be safely returned to parental custody and the juvenile court terminates reunification services. Then the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.]" *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1340.) Given the minors' young ages, they still have a chance for permanency and stability with their adoptive parents; developing that chance is now the overriding concern of these proceedings.

DISPOSITION

The judgment (order) is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.